

Appellant filed a traumatic injury claim (Form CA-1) alleging that on November 12, 2004 he sustained a back injury in the performance of duty while moving boxes. By decision dated November 28, 2005, the Office denied the claim for compensation. It found that the

medical evidence was insufficient to establish an injury. Appellant requested an appeal before the Board. By order dated May 25, 2006, the Board dismissed the appeal at appellant's request to seek reconsideration and submit new evidence to the Office.¹

On April 24, 2007 the Office received additional evidence. Appellant submitted a copy of the Board's May 25, 2006 order, on which he indicated that he had received the order on May 31, 2006 and believed he had until May 31, 2007 to file an appeal.

By letter dated April 30, 2007, the Office stated that it was unclear whether appellant was requesting reconsideration of the November 28, 2005 decision and requested clarification. On July 18, 2007 it received a letter dated April 18, 2007 requesting reconsideration. Appellant indicated that his prior appeal had been dismissed by the Board to enable him to request this reconsideration. On July 25, 2007 he submitted a June 22, 2007 letter, requesting reconsideration of his claim. The record indicates that on November 13, 2007, appellant submitted additional evidence.

In a decision dated November 17, 2008, the Office determined that appellant's reconsideration request was untimely. It further denied the request on the grounds that it did not establish clear evidence of error.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision.² The employee shall exercise this right through a written request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."³

Section 8128(a) of the Act⁴ does not entitle a claimant to a review of an Office decision as a matter of right.⁵ This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.⁶ The Office, through regulations,

¹ Docket No. 06-757 (issued May 25, 2006).

² 5 U.S.C. § 8128(a).

³ 20 C.F.R. § 10.605 (1999).

⁴ 5 U.S.C. § 8128(a).

⁵ *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁶ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application."

has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).⁷ As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for reconsideration is filed within one year of the date of that decision.⁸ The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁹

The Board has held, however, that a claimant has a right under 5 U.S.C. § 8128(a) to secure review of an Office decision upon presentation of new evidence that the decision was erroneous.¹⁰ In accordance with this holding, the Office has stated in its procedure manual that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.¹¹

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.¹² The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹³ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹⁴ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹⁵ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.¹⁶ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁷

⁷ Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, it has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.606(b).

⁸ *Id.* at § 10.607(a).

⁹ *See Leon D. Faidley, Jr.*, *supra* note 5.

¹⁰ *Leonard E. Redway*, 28 ECAB 242 (1977).

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(c) (May 1996).

¹² *See Dean D. Beets*, 43 ECAB 1153 (1992).

¹³ *See Leona N. Travis*, 43 ECAB 227 (1991).

¹⁴ *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

¹⁵ *See Leona N. Travis*, *supra* note 13.

¹⁶ *See Nelson T. Thompson*, 43 ECAB 919 (1992).

¹⁷ *Gregory Griffin*, 41 ECAB 458 (1990).

ANALYSIS

The most recent merit decision by the Office denying appellant's claim for an injury was dated November 28, 2005. Appellant initially requested an appeal with the Board, but his appeal was dismissed on May 25, 2006 at his request in order to pursue reconsideration before the Office. He contends that the Board's May 25, 2006 order allowed him to request reconsideration before the Office up to one year after he received the order on May 31, 2006. The Board's order advised appellant that he should submit a written request for reconsideration and noted that a claimant generally has one year from the date of an adverse Office decision to request an appeal before the Board. The Board's order did not advise appellant that he had one year in which to request reconsideration before the Office. The Office's regulations, as noted, clearly provide that a timely application for reconsideration must be made within one year of the Office's decision. Appellant, therefore, had until November 28, 2006 to file a timely application for reconsideration. Since his application for reconsideration was dated April 18, 2007, it is untimely.

In this case, appellant did not clearly state the reasons he felt the Office's November 28, 2005 decision was in error. While many documents were submitted to the record, there is little evidence that is relevant to the issue presented. Appellant's claim was for a back injury sustained while moving boxes on November 12, 2004. In an October 4, 2005 report, Dr. Ronald Hamm, Board-certified in family practice, noted in his history that appellant was "initially seen by administrative medicine for complaints related to an occupational 'injury' which occurred due to moving cartons of books on or about November 12, 2004. Appellant was treated and returned to duty." Dr. Hamm did not provide a complete history of the incident, a diagnosis or opinion on causal relationship between a diagnosed condition and the employment incident.

There is no evidence of record that is sufficient to establish clear evidence of error by the Office in the denial of the claim. The Board finds that the Office properly denied the application for reconsideration in this case.

CONCLUSION

The Board finds that appellant's application for reconsideration was untimely and failed to show clear evidence of error by the Office.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 17, 2008 is affirmed.

Issued: October 23, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board